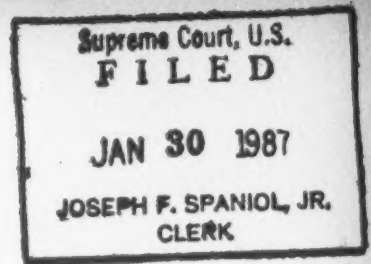


②  
No. 86-867



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IN THE  
**SUPREME COURT OF THE UNITED STATES**

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October Term, 1986

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MILLER SESSION and  
ROSE SESSION,

*Petitioners*

*v.*

I.T.O. CORPORATION OF AMERIPORT,

*Respondent*

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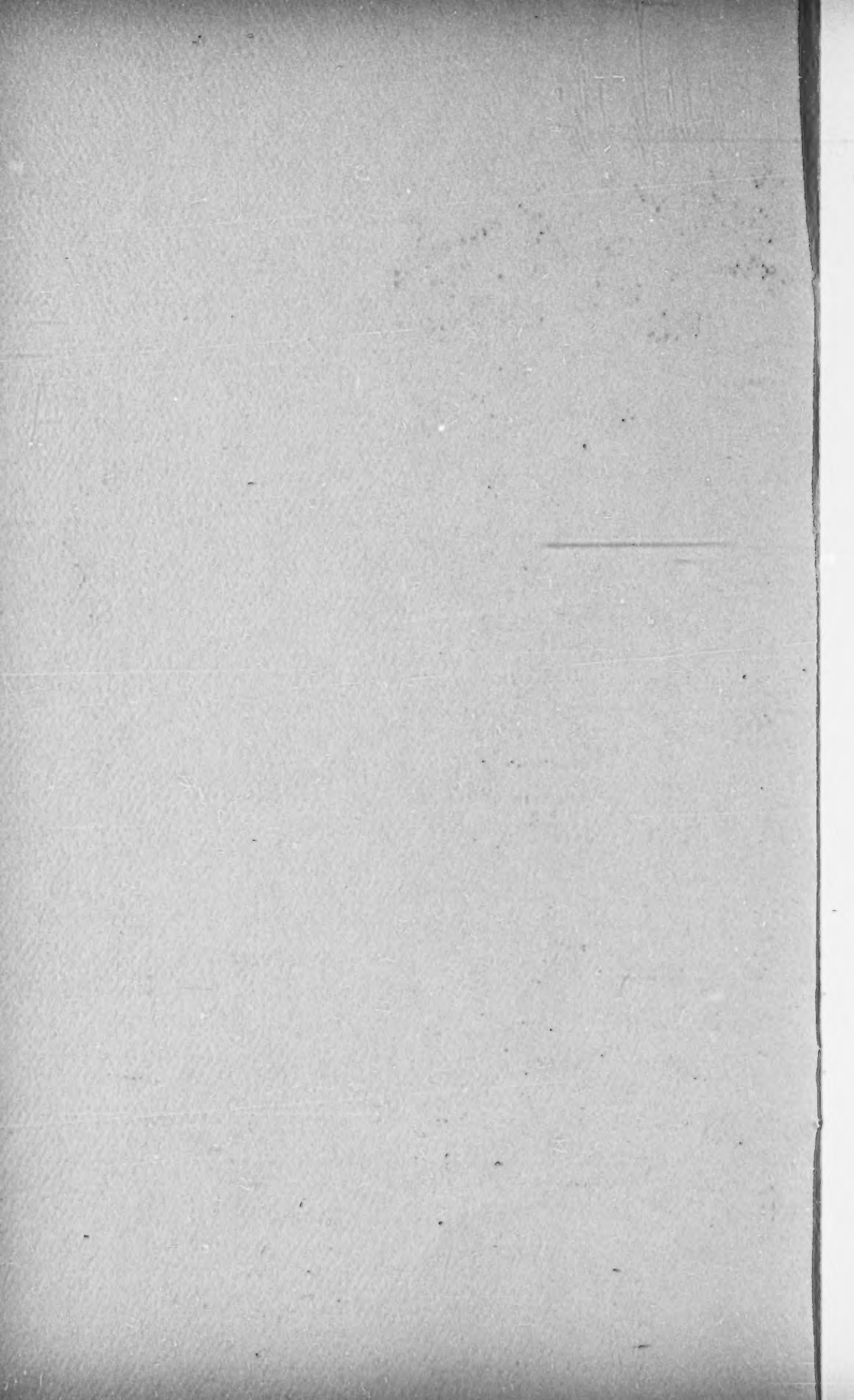
On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Third Circuit

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**RESPONDENT'S BRIEF  
IN OPPOSITION TO THE  
PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Does a stevedore have a statutory right to recover workers' compensation benefits, paid pursuant to the Longshoreman's and Harbor Workers' Compensation Act, from any recovery a longshoreman may obtain from a third party tortfeasor excepting the expenses reasonably incurred by the longshoreman in the third party litigation?

2. May a stevedore terminate payment of future compensation benefits if a longshoreman settles his suit against a third party tortfeasor without the stevedore's consent as required by 33 U.S.C. section 933(g)?

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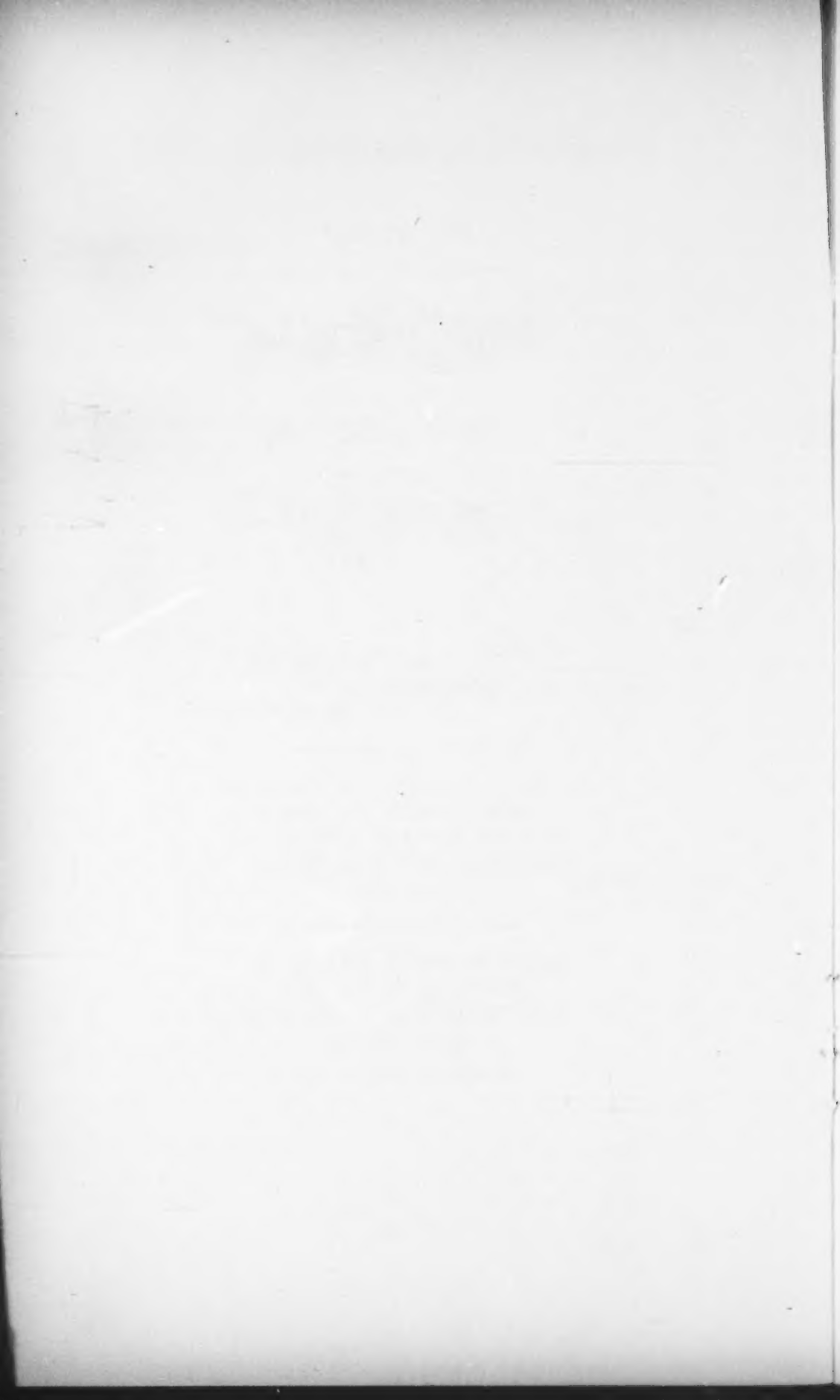
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On Petition for a Writ of  
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RESPONDENT'S BRIEF IN  
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## STATEMENT OF THE CASE

### Material Facts

On August 17, 1981, Petitioner, Miller Session, (hereinafter referred to as "Petitioner") who was employed as a longshoreman by Respondent, I.T.O. Corporation of Ameriport, (hereinafter referred to as "ITO") was injured while discharging cargo from a vessel docked at the Camden Marine Terminal in Camden, New Jersey. Following the accident, ITO began paying worker's compensation benefits to Petitioner pursuant to the provisions of the Longshoreman's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. section 901 et seq., (hereinafter referred to as the "LHWCA"). ITO has continued to make such payments up to the present.

On March 23, 1982, Petitioner brought an action in the United States District Court for the Eastern District of New Jersey against the South Jersey Port Corporation,

(hereinafter referred to as "SJPC") as operator of the Camden Marine Terminal, alleging that his injuries were caused by the negligence of SJPC. SJPC answered that it was a "public entity" of the State of New Jersey within the meaning of the New Jersey Tort Claims Act, N.J.S.A.

59:1-1 et seq. and among the defenses available to it under that Act is the defense that the public entity is entitled to take credit for payments made to an injured plaintiff by third parties, and that such third parties may not assert a right of subrogation against a public entity. Section N.J.S.A. 59:9-2e.

On April 16, 1984 Petitioner reached a tentative settlement agreement with SJPC which was contingent upon ITO's agreement that it would not assert its compensation lien and that Petitioner's future compensation rights would not be affected by the

settlement. However, ITO asserted that under the LHWCA and pertinent case law, it was entitled to recover from any settlement between SJPC and Petitioner the benefits it paid to Petitioner as a result of his injury. Furthermore, ITO noted that, under section 33(g) of the LHWCA, 33 U.S.C. section 933(g), any settlement made by Petitioner with SJPC without ITO's written consent would automatically terminate Petitioner's right to receive any future compensation after the settlement.

#### History of the Case

On May 25, 1984, Petitioner filed a Complaint in the United States District Court for the District of New Jersey seeking a declaratory judgment pursuant to 28 U.S.C. section 2201. Petitioner

alleged that there was a conflict between the provisions of the New Jersey Tort Claims Act and the LHWCA as they relate to ITO's subrogation rights for compensation payments made pursuant to the LHWCA. ITO filed an Answer and Jury Demand.

On January 22, 1985, Petitioner filed a Motion for Summary Judgment. ITO filed a Reply and a Memorandum of Law in opposition to Petitioner's Motion. Oral argument on the Motion was held before the Honorable Mitchell H. Cohen on May 3, 1985. On September 20, 1985, an opinion and Order were filed by the Court ordering that ITO is entitled to be reimbursed for its workers' compensation payments from any recovery Petitioner obtains from the SJPC excepting only Petitioner's costs of litigation. Additionally, the Court denied Petitioner's request for an order enjoining ITO from terminating compensation

benefits in the event that Petitioner settles his suit with SJPC without ITO's approval.

On October 18, 1985, Petitioner filed a Notice of Appeal with the District Court. Oral argument was held on July 30, 1986 in the United States Court of Appeals for the Third Circuit. A judgment Order was entered on August 6, 1986 affirming the judgment of the District Court. On September 3, 1986, a Petition for Rehearing was denied.

#### ARGUMENT

THIS CASE MEETS NONE OF THE STANDARDS OF REVIEW WHICH WOULD JUSTIFY A GRANT OF CERTIORARI.

This case was decided based on the district court's application of a federal statute, the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C.

section 901 et seq., (hereinafter referred to as the "LHWCA"). Petitioner seeks to establish a conflict between this decision and the decisions of this Court and a circuit court in Bloomer v. Liberty Mutual Insurance Co., 445 U.S. 74 (1980), and United States v. Lorenzetti, 467 U.S. 167 (1984) and The Etna, 138 F.2d 37 (3rd Cir. 1943). Additionally, Petitioner argues that there is a conflict between this decision and the provisions of a state statute, the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq. A review of the relevant case law and the pertinent state statute reveals that the decision of the district court is not inconsistent therewith.

I. THIS CASE INVOLVES THE PROPER APPLICATION OF A FEDERAL WORKERS' COMPENSATION STATUTE.

A stevedore's lien (acquired by payment of statutory workers' compensation benefits to a longshoreman) which was originally

a judicial creation, see, The Etna, supra, now has its foundation in legislation, see 33 U.S.C. section 933(f). The Etna court predicated its creation of the stevedore's lien on the equitable principles of unjust enrichment and double recovery. In Bloomer, the Court refused to reduce the stevedore's lien by its proportionate share of the longshoreman's legal expenses incurred in an action against a third party tortfeasor. Two important factors substantiate the position that The Etna and Bloomer are not in conflict with the holding in the instant case: (1) neither case addressed the factual situation where the recovery against the third party was less than the sum of the lien and the expenses of suit or the accompanying issue of priority of distribution, and (2) the 1984 amendment to the LHWCA which the lower court found dispositive of the

instant case (App. 12a), 33 U.S.C. section 933(f), was enacted subsequent to these decisions. The district court recognized "the frequency with which Congress has responded to Supreme Court interpretations of the Act by enacting subsequent amendments". (App. 12a - 13a). Thus, the 1984 amendments to the LHWCA specifically addressed the issue in this case and were correctly applied by the lower court.

The legislative history of the 1984 amendments to the Act elucidates Congress' intention regarding distribution of proceeds from a third party action brought by a longshoreman where the longshoreman's third party recovery was equal to or less than the amount of the stevedore's lien. As noted by Senator Hatch, the House and Senate versions of the amendment to Section 933(f) were very different:



The Senate bill amended Section 33(f) to establish that compensation paid by an employer shall be a first lien on any proceeds obtained by an employee in a tort suit against a third party. Implicit in this proposal was that the legal expenses of the employee, including attorney fees, would be totally subordinated to the compensation lien. The House amendment essentially reversed the order of priority. It would have permitted the employee to pay his attorney fees and litigation expenses first, before satisfaction of the compensation lien. This would be important where an employer's lien equalled or exceeded the amount recovered in the third party action. The House committee was concerned that an employee might conceivably be worse financially after incurring the expense of a suit than if he never had brought an action at all. In addition, the House committee believed that the employee was entitled to shelter a portion of recovery [15 percent] from any compensation lien. That committee viewed the 15 percent set-aside as comparable to the employer's right under section 33(e)(2) to retain 20 percent of any recovery in excess of litigation expense and compensation liability.

The conference agreement adopts a middle ground. First, it rejects the 15 percent set-aside in the House amendment and modifies current law by eliminating the employer's 20 percent set-aside in Section 33(e)(2). Second, it requires that the employee's

litigation expenses including reasonable attorney fees, be paid out of any recovery prior to the satisfaction of the compensation lien. It should be stressed though how this rule has special application in the cases where the aggregate of the litigation expenses, the employee's legal fees, and the compensation lien leave the employee with little, if any, recovery. In such circumstances, the conferees found merit in the approach articulated by the Court in Ochoa v. Employers National Insurance Company, 724 F.2d 1171 (5th Cir. 1984). That case held that where an employee's third party recovery was insufficient to cover both his attorney fee and the compensation lien, the lien was payable out of the net recovery, after costs of litigation, including reasonable attorney fees, were subtracted. The court of appeals emphasized that only reasonable attorney fees were allowed. Thus, where the recovery is insufficient to cover both the attorney fees and the compensation lien, leaving the employee with nothing, the court must evaluate the reasonableness of the fees and make an equitable adjustment as between the employee and his attorney. As noted in Ochoa, this approach attempts to do justice to the employee while upholding Bloomer v. Liberty Mutual Insurance Company, 445 U.S. 74 [100 S.Ct. 925, 63 L.Ed.2d] (1980), which forecloses an adjustment of an employer's lien in order to underwrite the attorney fees of the employee.

130 Cong. Rec. S11, 626 (daily ed. Sept. 20, 1984) (remarks of Senator Hatch).

In the House Conference Report, the Committee of Conference summarized the compromise over Section 933(f) as follows:

The Conference substitute establishes the following priority for distribution of proceeds in a recovery by an employee: first, the litigation expenses, including reasonable attorney fees, are satisfied. This may require that the Court exercise its discretion to adjust the attorney fee to assure equity for both the employee and his attorney. The compensation lien on the net recovery remains inviolable, consistent with Bloomer v. Liberty Mutual Insurance Co., 445 U.S. 74 (1980).

House Conference Report No. 98-1027, P. 36. See generally 1984 U.S. Code Cong. and Admin. News, pp. 2734-2787.

A review of the legislative history of Section 933(f) leaves no doubt as to the intention of Congress in providing for the

recovery by a stevedore of benefits already paid under the Act. Regardless of the roots of the stevedore's lien, it is clear that it is now a statutorily based right of recovery.

This decision does not, as Petitioner suggests, misapply this Court's decision in United States v. Lorenzetti, 467 U.S. 167 (1984). Lorenzetti involved a different federal statute and was used as guidance, rather than authority, by the lower court.

Finally, as interpreted and applied by the lower court, the LHWCA is not in conflict with the New Jersey Tort Claims Act. This decision does not negate the subrogation preclusion provision of the state statute. Given that the stevedore's lien is a statutory right to recover, and no longer a judicially created lien based on principles of subrogation, the New

Jersey Tort Claims Act is not relevant to the situation present before this Court. Respondent's claim is directly against petitioner's recovery.

II. THE PETITIONER'S REQUEST FOR INJUNCTIVE RELIEF WAS PROPERLY DENIED IN ACCORDANCE WITH THE CLEAR LANGUAGE OF 33 U.S.C. SECTION 933(g).

Section 933(g) of the LHWCA provides that a stevedore may terminate its payment of future compensation benefits if a longshoreman settles his suit with a third party tortfeasor without the stevedore's prior written approval. Given the stevedore's obvious interest in the longshoreman's settlement, the lower court correctly applied the statute where Respondent did not consent to Petitioner's proposed settlement.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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